

CONTENTS

<i>Table of Cases</i>	xxiii
<i>Table of Statutes</i>	xxxvii
<i>Glossary and Abbreviations</i>	xli

1 GENERAL PRINCIPLES

1. General Principles of ADR

A The Importance of ADR	1.01
B The Definition of ADR	1.03
C The Role of the Courts in the Use of ADR	1.05
D The Role of Judges in the Use of ADR	1.07
E The Context of the Jackson Review of Costs	1.13
F Key Recent Developments	1.17
G The Success of ADR	1.20
H Compulsion to Use ADR	1.22
I Regulation of ADR	1.24
J The International Context	1.29

2. The Range of ADR Options

A Adjudicative Options	2.02
Arbitration	2.04
Adjudication	2.08
Expert determination	2.11
Other adjudicative options	2.12
B Non-Adjudicative Options	2.13
Offer and acceptance	2.14
Negotiation	2.16
Mediation	2.19
Early neutral/expert evaluation	2.24

Mini trial	2.26
Conciliation	2.27
Complaint or grievance procedures	2.28
Other options	2.29
C Motivations for the Use of ADR	2.30
Lower costs	2.31
Speed of settlement	2.32
Choice of forum	2.33
Control of process	2.34
Flexibility of process	2.35
Confidentiality	2.36
A wider range of issues/outcomes may be considered	2.37
Shared future interests may be protected	2.38
Use of a problem-solving approach	2.39
Risk management	2.40
D Criteria for the Selection of an ADR Option	2.41
How important is it to minimize costs?	2.42
How important is fast resolution?	2.43
How much control does the party want?	2.44
What are the main objectives of the party?	2.45
Is a future relationship important?	2.46
Is the view of an expert important to key issues?	2.47
Would neutral assistance be valuable?	2.48
E When ADR May not Be Appropriate	2.49
The need for a precedent	2.50
The importance of a court order	2.51
The relevance of interim orders	2.52
Evidential rules are important	2.53
The strength of a case	2.54
The complexity of the case	2.55
High levels of animosity	2.57
Power imbalance	2.58
Quasi-criminal allegations	2.59
Having a day in court	2.60
Enforcement may be an issue	2.61
 3. Timing the Use of ADR in Relation to the Progress of a Case	
A The Importance of Timing	3.01
B Procedural Factors Relevant to Timing	3.04

Pre-selection of ADR	3.04
The use of ADR at the pre-action stage	3.06
On issue of proceedings	3.09
Case and costs management and directions	3.10
The use of ADR at an interim stage	3.14
The use of ADR before and during trial	3.19
The use of ADR in relation to appeals	3.21
The use of ADR in relation to assessment of costs	3.23
C Practical Factors Relevant to Timing	3.24
The overriding objective	3.25
The position as regards costs	3.26
The timeframe for reaching resolution	3.27
The issues in the case	3.28
The availability of information	3.29
The availability and importance of evidence	3.30
The importance of interim applications	3.32
The strength of a case	3.33
Antagonism between the parties	3.34
Specific types of case	3.35
 4. Roles and Responsibilities of Lawyers and Parties in ADR	
A Overview	4.01
B Duties Under the Civil Procedure Rules	4.02
C The Role of a Lawyer in Advising on ADR	4.03
D Authority to Settle	4.07
E The Role of a Lawyer in Advising on Terms of Settlement	4.09
F The Role and Responsibilities of Parties in Relation to ADR	4.11
G Addressing Concerns About ADR	4.13
Appropriateness of the litigation process	4.14
Robustness of process	4.15
Proposing ADR may indicate weakness	4.16
ADR might undermine litigation	4.17
ADR might provide pressure to settle	4.18
ADR may be used as a delaying tactic	4.19
Limited knowledge of ADR process may be a concern	4.20
ADR may incur extra expense	4.21
ADR may be abused where a claim lacks merit	4.22

H	Persuading Another Party to Use ADR	4.23
	Identify and address concerns	4.26
	Propose specific benefits that ADR might offer	4.27
	Offer information about ADR options	4.28
	Propose a limited or simple ADR option	4.29
	Offer carrots	4.30
	Offer to pay reasonable ADR fees	4.31
	Engage the assistance of the judge	4.32
I	Potential Liability of a Lawyer in Relation to ADR	4.33
	Complaints	4.36
	Wasted costs	4.37
	Professional negligence	4.38
 5. Privacy, Privilege, and Confidentiality Clauses		
A	Importance of Privacy and Confidentiality in ADR	5.01
B	Control of Information in ADR	5.09
C	Legal Professional Privilege and ADR	5.15
D	The ‘Without Prejudice’ Principle	5.17
E	Confidentiality Clauses	5.27
	Negotiation	5.30
	Mediation	5.31
	Experts, early neutral evaluation, or expert determination	5.33
	Arbitration	5.34
F	Potential Loss of Confidentiality	5.36
G	Agreements to Keep Terms of Settlement Confidential	5.41
 6. Ethics		
A	Professional Responsibilities in ADR	6.01
B	Solicitors	6.03
C	Barristers	6.05
D	Acting in the Client’s Best Interests	6.07
E	Acting within Instructions	6.09
F	Duties in Relation to Client Confidentiality	6.11
G	Duties in Relation to an Opponent	6.14
H	Duties in Relation to a Funder	6.16

I	Duties in Relation to a Court	6.18
J	Lawyers who Provide ADR	6.19
 7. Funding ADR Procedures		
A	Expense and Funding	7.01
B	The Potential for ADR to Save Costs	7.06
C	The Potential Cost of an ADR Process	7.08
	Negotiation	7.11
	Mediation	7.13
	Arbitration	7.18
	Early neutral evaluation, expert determination, and adjudication	7.21
D	Funding Bases for an ADR Process	7.22
	Self-funding	7.24
	Insurance	7.25
	Third party or litigation funding	7.27
	Conditional fee agreement (CFA)	7.28
	Damages-based agreements (DBA)	7.30
	Legal Aid Agency funding	7.32
	Other options	7.33
E	Costs Management and Proportionality	7.34
	Costs management	7.35
	Proportionality	7.37
F	Overall Financial Analysis and Risk	7.39
 8. ADR Prior to the Issue of Proceedings		
A	The Context where No Proceedings Have Been Issued	8.01
B	Powers of the Court Prior to Issue of Proceedings	8.06
C	Part 36 Offers Prior to Issue	8.07
D	Settlements Reached with No Issue of Proceedings	8.08
E	Pre-Action Costs	8.10
F	Practice Direction Pre-Action Conduct and Protocols Requirements	8.14
G	Making Reasonable Attempts to Settle where No Proceedings Have Been Issued	8.19
	Proposing ADR	8.21
	Responding to a proposal to use ADR	8.22
H	Potential Justifications for Non-Compliance	8.24

2 INTERPLAY BETWEEN ADR, CPR, AND LITIGATION

9. The Approach of the Courts to ADR

A Introduction	9.01
B Judicial Encouragement of ADR	9.05
C Can the Court Compel the Parties to Use ADR?	9.06
D The Court Guides	9.15
E Pre-Action Protocols	9.16
F The Overriding Objective and ADR	9.17
G Case Management Powers and ADR	9.20
H Directions Questionnaires and ADR	9.22
I Granting Stays for ADR	9.24
J Contractual ADR Clauses	9.27
K Costs Alternative Dispute Resolution	9.36

10. Costs and Cost Shifting in ADR

A Liability to Pay for an ADR Process	10.01
B Recovery of Costs within an ADR Process	10.05
Advance agreement on costs	10.05
Subsequent agreement on costs	10.06
Award of costs in adjudicative ADR	10.07
C Recovery of ADR Costs within a Court Process	10.08
General principles	10.08
If a settlement is reached	10.14
A decision on costs alone	10.15
At an interim stage	10.16
As part of damages	10.17
At trial	10.18
The amount of costs	10.22
D Part 36 Offers	10.25
Qualified one-way cost shifting	10.32

11. Sanctions for Refusing to Engage in ADR Processes

A Introduction	11.01
B The Court's General Powers to Make Costs Orders	11.04

C	Failure to Comply with Pre-Action Protocols	11.05
D	Unreasonable Refusal to Consider ADR	11.07
	The nature of the dispute	11.10
	The merits of the case	11.11
	Extent to which other settlement methods have been attempted	11.15
	Whether the costs of ADR would be disproportionately high	11.18
	Whether delay in setting up and attending ADR would be prejudicial	11.19
	Whether ADR had a reasonable prospect of success	11.20
E	Other Factors	11.23
	Whether an ADR order was made by the court	11.24
	Obtaining further evidence or information before using ADR	11.27
	The impact of Part 36 offers on a refusal to use ADR	11.30
	Unreasonable refusal of other offers	11.33
F	The Claimant's Failure to Initiate ADR Processes	11.34
G	Failing to Make an Offer to Settle a Claim	11.38
H	Delay in Consenting to ADR	11.41
I	Both Parties at Fault	11.43
J	Rejecting ADR Before the Hearing of an Appeal	11.45
K	Backing out of ADR	11.48
L	Unreasonable Conduct in Mediation	11.50
M	Indemnity Costs Orders for Unreasonable Conduct Regarding ADR	11.52
N	Silence in the Face of an Invitation to Use ADR	11.59
O	Prevarication in Relation to ADR	11.62
P	What Practical Steps should be Taken by a Party to Avoid Sanctions?	11.63
Q	Privileged Material and Sanctions	11.65

3 NEGOTIATION

12. Negotiation and Joint Settlement Meetings

A	Negotiation as a Form of ADR	12.01
B	The Negotiation Process	12.03
	Professional conduct and ethics	12.05
	Procedure and evidence	12.09

C Negotiation as a Context for Mediation	12.15
D Joint Settlement Meetings	12.16

4 MEDIATION

13. Mediation: General Principles

A What is Mediation?	13.01
B Does Mediation Work?	13.02
C Why Does Mediation Work?	13.04
D Comparison Between Negotiation and Mediation	13.06
E Judicial Endorsement of Mediation	13.07
F Disputes Suitable for Mediation	13.08
G The Timing of Mediation	13.11
H Persuading a Reluctant Party to Consider Mediation?	13.16
I What Can Be Done by the Court to Make a Reluctant Party Consider Mediation?	13.17
J The Costs of Mediation	13.18
K The Funding of Mediation Costs, Fees, and Expenses	13.21
L The Mediator's Role	13.22
Organizing the mediation process	13.23
Acting as a facilitator	13.25
Acting as intermediary	13.26
Post-mediation role	13.28
M Ethical Conduct Required of the Mediator	13.29
Competence	13.33
Independence and neutrality	13.34
Impartiality	13.35
The mediation procedure	13.36
Fairness	13.37
Confidentiality	13.39
Termination of the mediation	13.40
N Accreditation and Regulation of Mediation	13.43
Training and accreditation requirements	13.43
O The Civil Mediation Council	13.44

P	Confidentiality in Mediation	13.47
	Information given to the mediator	13.50
	Can the mediator enforce the confidentiality clause?	13.51
	When will the court override the confidentiality provisions?	13.52
	Other exceptions to confidentiality	13.56
Q	The Without Prejudice Rule in Mediation	13.57
	Communications that are not protected by the without prejudice rule in mediation	13.60
	Can the mediator rely on the without prejudice rule?	13.61
R	Legal Advice Privilege in Mediation	13.62
S	The Mediator as Witness	13.63
T	Can a Mediator be Sued?	13.64
	Legal proceedings	13.64
	Disciplinary proceedings	13.67
 14. Preparation for the Mediation		
A	Introduction	14.01
B	Styles of Mediation	14.03
	Facilitative mediation	14.05
	Evaluative mediation	14.09
	Transformative mediation	14.17
C	Selecting a Mediator	14.19
	Factors influencing the selection of a mediator	14.22
D	The Duration of Mediation	14.35
E	Selecting a Venue	14.37
F	The Agreement to Mediate	14.42
G	Pre-Mediation Meeting/Contact	14.47
H	The Attendees	14.49
	Representatives of the parties	14.51
	Person with authority to settle	14.52
	Lawyers	14.53
	Insurers	14.54
	Interest groups	14.55
	Experts	14.56
	Witnesses of fact	14.59

I	The Position Statements	14.61
	The aims in drafting the position statement	14.65
	The content of the position statement	14.67
	Joint position statement	14.72
J	The Key Supporting Documents	14.73
	Agreed bundle	14.73
	Confidential bundles	14.75
K	Disclosure of Other Documents	14.81
L	Complete Case Papers	14.82
M	Further Information the Mediator May Require	14.83
N	Risk Assessment	14.84
O	Options for Settlement	14.89
P	Specimen Settlement Clauses	14.90
Q	Conclusion	14.91
 15. The Mediation Process		
A	When Does the Mediation Start?	15.01
B	The Stages in Mediation	15.04
C	The Opening Stage	15.08
	The opening joint meeting (plenary session)	15.08
	Extension of the plenary session	15.09
	The separate private meetings (or closed meetings)	15.10
D	The Exploration/Information Stage	15.15
	Carrying out a 'reality test'	15.16
	Probing the underlying issues	15.17
	Helping the parties to devise options for settlement	15.18
E	The Negotiating/Bargaining Stage	15.19
	Joint meetings of the legal representatives of the parties	15.22
	Joint meetings between the lay clients	15.23
	Joint meetings of the experts	15.24
F	The Settlement/Closing Stage	15.25
	If settlement is reached	15.25
	If no settlement is reached	15.29
G	The Closing Joint Meeting	15.30
H	The Mediator's Role Following the Conclusion of the Mediation	15.31

I	Main Variations in the Process	15.36
	Evaluative mediation	15.38
J	Med-Arb	15.39
K	Arb-Med	15.42
	Telephone mediations	15.44
	Mediations conducted online	15.47
L	Mediation Advocacy	15.48
16.	Court Mediation Schemes and Other Schemes	
A	Introduction	16.01
B	Historic Schemes	16.04
C	Current Court Mediation Schemes	16.05
	The HMCTS Small Claims Mediation Service	16.06
	Court of Appeal Mediation Scheme	16.10
	The County Court at Central London Mediation Pilot Scheme	16.12
	The Housing Possession Mediation Pilot Scheme	16.13
	The Court of Protection Mediation Scheme	16.14
D	Civil Mediation Online Directory	16.15
	The Fixed Fee Mediation Scheme	16.16
E	Judicial Mediation Schemes	16.17
	Court settlement process in the Technology and Construction Court	16.21
	Judicial mediation in Employment Tribunals	16.23
F	Mediation in Specific Cases	16.24
	Mediation in cases in the Commercial Court	16.24
	Complex construction, engineering, and technology disputes	16.25
	Family cases	16.26
	Workplace mediation	16.27
	Mediation in employment disputes	16.29
G	Mediating Multi-Party Disputes	16.30
H	Other Mediation Processes	16.36
	Project mediation	16.36
	Mini-trial or executive tribunal	16.37
	Consensus-building mediation	16.42
	Deal mediation	16.43
I	Community Mediation	16.44
J	Pro Bono Mediation and LawWorks	16.48

17. EU Directive on Mediation in Civil and Commercial Cases

A	Introduction	17.01
B	The EU Mediation Directive	17.02
	Objective of the Directive	17.03
	Application of the Directive	17.05
	Main provisions of the EU Directive	17.07
	Ensuring the quality of mediation	17.08
	Implementation of the Directive by the UK	17.17
	The effect of Brexit	17.18
	Implementation of the EU Mediation Directive in other Member States	17.19
C	European Code of Conduct for Mediators	17.20

5 RECORDING AND ENFORCING SETTLEMENT

18. Recording Settlement—Private Agreement

A	Reaching a Clear Outcome	18.01
	Funding arrangements and reasonable offers	18.04
B	Forms of Recorded Outcome	18.06
	Written agreement	18.07
	Full and final settlement	18.09
C	Records Made During the ADR Process	18.11
D	Forms for Recording Settlement	18.14
	Oral contract	18.15
	Exchange of letters or emails	18.16
	Formal written contract	18.18
	Other legal documents	18.20
E	Drafting Terms of Settlement	18.22

19. Recording Settlement—Court Proceedings

A	Settlements in Existing Court Proceedings	19.01
B	Methods of Recording Settlements in Court Proceedings	19.02
	Judgment for immediate payment or by instalments	19.04
	Endorsement of settlement on backsheets	19.05
	Interim consent order	19.06
	Tomlin Order	19.10
	Restrictions on consent orders and judgments	19.15

C	Dealing with the Proceedings	19.16
D	Drafting of Consent Orders	19.17
E	Terms as to Costs	19.18
F	Administrative Consent Orders	19.20
G	Informing the Court of Settlement	19.21
20.	Enforcement of Settlements	
A	Introduction	20.01
B	Methods of Enforcing Compromise Agreements	20.02
C	Discharge of Original Obligation by Compromise	20.03
D	Enforcement of Compromise Contracts	20.04
	Effect of endorsements on briefs	20.04
	Enforcement by civil proceedings	20.05
	Bankruptcy and winding-up	20.07
E	Challenging Compromise Contracts	20.08
F	Enforcement of Court Orders	20.09
 6 OTHER ALTERNATIVE DISPUTE RESOLUTION OPTIONS AND THE INTERNATIONAL PERSPECTIVE 		
21.	Online ADR and ODR	
A	Overview	21.01
B	The Use of Portals for Claim Management and Settlement	21.05
C	The Use of Online Resources to Support ADR Processes	21.07
D	The Development of ODR Options	21.11
E	International Developments	21.18
	Principles for international ADR and ODR	21.20
	European Union regulation	21.22
22.	Early Neutral Evaluation	
A	Introduction	22.01
B	At what Stage Should ENE Be Employed?	22.05
C	When Should ENE Be Used?	22.06
D	Choice of Evaluator	22.08

E	Procedure	22.10
F	Neutral Fact-Finding	22.14
G	Judicial Evaluation	22.15
	Judicial evaluation in the Commercial Court	22.16
	Judicial evaluation in the Technology and Construction Court	22.17
	Judicial evaluation in the Chancery Division	22.19
	Judicial evaluation in the Queen's Bench Division	22.20
23.	Conciliation, Complaints, Grievances, and Ombudsmen	
A	Introduction	23.01
	Definitions	23.02
B	Conciliation	23.03
	Employment conciliation	23.04
C	Complaints and Grievance Procedures	23.08
	Raising a complaint or grievance	23.09
	Complaints handling	23.10
	Acting for a party in a complaint	23.13
	Decisions in complaints and grievance investigations	23.14
	Information following exhaustion of complaints procedures	23.15
D	Ombudsmen	23.16
	Complaints handling by ombudsmen	23.18
	Procedure on references to ombudsmen	23.19
	Grounds on which ombudsmen make their decisions	23.20
	Relief available	23.22
	Can a complainant bring court proceedings?	23.23
24.	Expert (or Neutral) Determination	
A	What is Expert Determination?	24.01
B	Cases Suitable for Expert Determination	24.09
C	Contractual Nature of Expert Determination	24.10
D	Selection of the Expert	24.12
E	Procedure	24.13
	Implied duty to cooperate	24.16
F	Confidential Information	24.17
G	Nature of the Decision	24.19
H	Reasons for the Decision	24.20

I	Issues that Can Arise in Expert Determination	24.23
J	Ignoring an Expert Determination Clause	24.24
	Breach of contract	24.24
	Applications to stay court proceedings pending expert determination	24.25
K	The Extent of the Expert's Jurisdiction	24.28
L	Grounds for Challenging the Decision	24.31
M	Contractual Grounds for Challenge	24.34
	No reasons for decision	24.34
	Manifest error	24.35
	An error of law	24.39
	Failure to act lawfully or fairly	24.41
	The decision is not intended to be final on matters of construction	24.44
N	Other Grounds on Which an Expert's Determination Can Be Challenged	24.48
	Material departure from instructions	24.48
	Fraud	24.51
	Collusion	24.52
O	Procedure for Making a Challenge	24.53
P	Enforcing a Decision	24.54
Q	Suing the Expert	24.55
R	Disputes Review Panels	24.56
 25. Arbitration		
A	Introduction	25.01
B	Fundamental Concepts in Arbitration	25.03
C	Requirements	25.05
	Contractual foundation of arbitration	25.06
	Mandate of the arbitral tribunal	25.07
D	Stay of Legal Proceedings	25.08
E	Commencement	25.10
F	Procedure in Arbitrations	25.12
	Preliminary meeting	25.13
	Pre-trial hearing/conference	25.16
	Bundles	25.17
	No right to an oral hearing	25.18
	The hearing	25.19

G Privacy and Confidentiality	25.21
H Awards	25.22
I Enforcement of Awards	25.24
J Appeals	25.26
26. Construction Industry Adjudication	
A Introduction	26.01
B Requirements	26.03
Construction contract	26.03
Dispute	26.04
C Contractual Right to Adjudication	26.05
D Commencement of the Adjudication	26.06
Notice of adjudication: the commencement of adjudication	26.06
Ambit of the reference	26.07
Nomination of adjudicator	26.09
Referral notice	26.10
E Procedure	26.11
Timetable for procedural steps	26.11
Response to referral notice	26.12
Subsequent statements of case	26.13
F Adjudicator's Decision	26.14
G After the Adjudication	26.16
<i>Index</i>	329